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A.C.T.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897,

No. 56.

RICHARD H. FLETCHER, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF
COLUMBIA.

FILED AUGUST 24, 1895.

(16,006.)

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1 In the Court of Appeals of the District of Columbia.

RICHARD H. FLETCHER, Appellant,	}	No. 438.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.		

Supreme Court of the District of Columbia.

RICHARD H. FLETCHER	}	Law. No. 32581.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.		

UNITED STATES OF AMERICA, }
District of Columbia, } *ss.*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed April 4, 1891.

In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER	}	Law. No. 31581.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.		

The plaintiff, Richard H. Fletcher, sues the defendant, The Baltimore and Potomac Railroad Company, a corporation having an office and doing business in the District of Columbia, for that heretofore, to wit, on the 16th day of May, A. D. 1890, at the city of Washington, in the District of Columbia, the plaintiff, while peaceably and lawfully on the public streets, to wit, on South Capitol street near the corner of Virginia avenue, in said city and District, was, by and through the carelessness and negligence of the defendant, its servants and agents, violently struck in the left inguinal region of the body with a large and heavy piece of timber carelessly and negligently thrown by one of the defendant's servant from one of the cars of the defendants, whereby the plaintiff was greatly bruised and seriously and permanently injured, and was caused to suffer great pain, and he has ever since been and still is suffering pain therefrom, insomuch as to be unable to properly attend to his ac-

2 accustomed occupation and duties without great pain and suffering; that he has lost in consequence of said injury a great deal of time from his daily work, and his power and ability to pursue his occupation and to earn a livelihood for himself and family have been greatly and permanently lessened and his health and comfort greatly impaired and affected, and he has been compelled to expend large sums of money in the employment of a physician and for medicines and surgical appliances rendered necessary by his said *necessaries*, whereby and by reason of the aforesaid wrongs and injuries resulting as aforesaid from the carelessness of the defendant, its servants and agents, the plaintiff has suffered great damage, to wit, the sum of ten thousand dollars (\$10,000-), which sum the plaintiff claims, besides costs.

FRANKLIN H. MACKEY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

FRANKLIN H. MACKEY,
Attorney for Plaintiff.

Plea.

Filed May 8, 1891.

In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER	} At Law. No. 31581.
<i>vs.</i>	
BALTIMORE AND POTOMAC RAILROAD COMPANY.	

Plea.

And now comes the said defendant and for plea says that it is not guilty in manner and form as plaintiff hath alleged.

ENOCH TOTTEN,
Att'y for Defendant.

Joinder of Issue.

Filed May 9, 1891.

In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER	} At Law. No. 31581.
<i>vs.</i>	
BALTIMORE AND POTOMAC RAILROAD COMPANY.	

The plaintiff hereby joins issue on the defendant's plea.

FRANKLIN H. MACKEY,
Att'y for Plaintiff.

SATURDAY, December 22, 1891.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * *

3

RICHARD H. FLETCHER, Plaintiff,

vs.

BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant.

At Law.
No. 31581.

This cause coming on to be heard upon the plaintiff's motion for a new trial, and the same having been heard is overruled. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against said plaintiff its costs of defense, to be taxed by the clerk, and have execution thereof. Whereupon the plaintiff notes an appeal to the Court of Appeals.

* * * * *

MONDAY, *December 31st*, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * *

RICHARD H. FLETCHER, Plaintiff,

v.

THE BALTIMORE AND POTOMAC R. R. Co., Defendant.

At Law. No. 31581.

* * * * *

In the above-entitled causes it is ordered that the present October term, 1894, be, and it is hereby, prolonged not to exceed thirty days for the purpose of settling bills of exceptions.

1895, January 3.—Bond for appeal filed.

Order for Appeal & Citation.

Filed January 5, 1895.

In the Supreme Court of the District of Columbia, the 5 Day of Jan'y, 1895.

RICHARD H. FLETCHER

vs.

BALTIMORE & POTOMAC R. R. Co.

At Law. No. 31581.

The clerk of said court will enter an appeal from the order of the court overruling the motion for a new trial and issue citation to the defendant.

FRANKLIN H. MACKEY,
Attorney for Plaintiff.

4 In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER	}	At Law. No. 31581.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.		

The President of the United States to the Baltimore and Potomac Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 5th day of January, 1895, wherein Richard H. Fletcher is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.	Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-five.
-------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 9th day of February, 1895.

ENOCH TOTTEN,
Attorney for Appellee.

(Endorsed :) No. 31581. Law. Richard H. Fletcher *vs.* Baltimore and Potomac Railroad Co. Citation. Issued January 5, 1895. Served cop- of the within citation on ———, ———, marshal. F. H. Mackey, attorney for appellant.

Bill of Exceptions.

Filed January 24, 1895.

In the Supreme Court of the District of Columbia.

RICHARD FLETCHER	}	Law. No. 31581.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD.		

Bill of exceptions.

Be it remembered that on the trial of* this cause before the Hon. Justice Bradley and a jury on the 6th day of December, 1894, the plaintiff, testifying in his own behalf, gave evidence tending to prove that he was the plaintiff in the case; that on the 16th day of May, 1890, he was working at the workshops of the defendant and had finished his day's work at about a quarter to six in the evening.

5 He then started for home. When he came to South Capitol street and Virginia avenue he stopped to see if he could see any of the workmen coming, in order to have company on his way home. He was standing on the pavement, on the south side of the railroad track. The track ran down the middle of Virginia avenue. As he was standing there, one of the defendant's work trains passed by, going, as witness supposed, about 20 miles an hour. These were open flat cars. There were a number of workmen on the cars returning from their day's work down the road and going home. One of them threw from the car, just as it was passing plaintiff, a stick of bridge timber six inches square and about six feet long. It struck the ground and, rebounding, the end of it struck plaintiff in the region of the groin; that he suffered greatly from the injury, being confined to his house for about 32 days. When he got so that he could go out he did what work he could, but has never been able to do the hard work that he could do before the injury. Every now and then he has to lose a day or two on account of his disability. When he works hard it causes him great pain in the region of the groin. He suffered a great deal of pain at night. Some nights he hardly gets a half hour's sleep from the pain. Before the accident he weighed 170-odd pounds and now weighs 154; has had physician's attendance; has worn pads and a truss, by the direction of his physician; wore the truss for over a year. Plaintiff's wages at the time of the accident were 15 cents an hour; has earned as much as \$50.25 a month. He was suffering with pains from the injury now (at the trial); suffers more from it now than he did a year ago.

Dr. HAMILTON P. HOWARD, called in behalf the plaintiff, gave evidence tending to show that he was a physician; had treated plaintiff professionally; examined the plaintiff physically about the middle of January, 1894, and another examination about three weeks ago. Plaintiff showed great soreness about the region of the groin. There was also pronounced soreness of the testicle and along the spermatic cord and an apparent tenderness down the limb to the knee and an exaggerated condition of the nervous reflex. If the plaintiff has received a blow in the region of the groin from a stick of timber about five feet long and five or six inches square thrown from a rapidly moving car witness would attribute the condition of the plaintiff to the blow. Considering the age of the plaintiff, the length of time he has been injured, his physical condition before the injury and what it is now, witness did not think plaintiff would ever recover.

CYRUS HALL, a witness called on behalf of the plaintiff, gave evidence tending to prove that he was in the employ of the defendant company on the 16th of May, 1890; that he worked with the repairmen on the defendant's road; that he lived in Alexandria; went down on the dirt trains or repair trains in the morning to the points where repairs were needed, and returned in the evening about 5 or 6 o'clock. On the day in question he and the men were working somewhere down the road near Quantico. He got off the train

6 at his home that night and did not know anything about the accident until next morning, when he and the other workmen were notified by the captain in charge of the gang that they should not throw any more wood from the train while it was in motion. Witness had been working for the company at this business about two and a half years; has seen timber thrown off the train by workmen after the train got into town. Witness further testified as follows: "We had been throwing off timber all the time, more or less. When we were coming in at and near points to our homes we would heave it off the train while it was going along slow; it was wood to cook our grub; we were told not to hurt anybody, but we never had been notified thoroughly by the railroad company not to throw it off. This throwing of wood by the workmen from the cars while in motion has been so often done that I never took any particular account of the number of times. I have thrown off some and I have seen a *nother* of others throw off some. It has been done time and again, and there was never any objection that I knew of until that time. Sometimes the wood that was thrown off was little pieces of stick- of pine; sometimes old rotten ties, according to what he could get hold of. We always threw them off the train nearest to the closest point to our homes to carry home or to have some one to carry them for us. I have seen Wood thrown off in Alexandria and in Washington—that is, when the cars were passing through. I have seen it often. I have thrown off pieces for myself and thrown it off for other men, both in Alexandria and in Washington. When I threw it off the car was always moving along; I suppose 4 to 3 miles an hour. We tried not to hurt people. We would always look out and see that we did not hit anybody. I never did hit anybody. The car was not going so fast. It was wood that he had picked up for firewood—old pieces of plank—and whatever we could get hold of."

On cross-examination witness testified that he had thrown off wood in Washington for himself and others 4 or 5 or maybe 8 or 10 times, and further gave evidence as follows:

Q. Did you not have orders not to throw things off the moving train?

A. No, sir; we did not have any orders as I know anything about. We didn't have no particular orders by the captain not to do it before the morning that the accident happened. Ab. Anderson, a kind of foreman of the workmen, told us to be careful not to hurt any one.

WILLIAM JOHNSON, called in behalf of the plaintiff, gave evidence tending to show that he was employed by the defendant company as a repairman on the road; that he was on the car at the time this piece of timber was thrown off. It was in the evening, about 6 o'clock. One of the workmen by the name of George Washington threw it off. Witness had been in the employ of the road about 8 or 9 years; had seen pieces of timber thrown by the workmen from the work-train when in motion, and within the limits of the city, by

7 the workmen upon it; has seen it done quite often, but how many times is unable to tell; never knew of any order of the company prohibiting it from being done until after this accident happened; the practice of throwing timber off by the workmen continued all the time witness was on the road; they had been doing it when he went there and continued doing it; could not tell how fast the train was going; it was going pretty slow; he used to throw it off in Alexandria and in Washington; the train was going tolerably fast when Mr. Fletcher was hurt, but how fast he could not tell; the piece of timber was a square piece of timber about four feet long, he guessed; he didn't measure it; he was about three cars away from the stick of timber when it was thrown off.

Said Johnson, on cross-examination, was asked where the greater number of men employed on this work-train lived, and answered "the biggest portion of them lived in Alexandria," and further testified that the pieces of wood were generally thrown off in Alexandria and there was not much thrown off in Washington, "because the men who lived in Washington lived a good ways from the railroad and didn't often bring any wood up here."

THOMAS COLEMAN gave evidence on behalf of the plaintiff tending to show that he lived in Alexandria; that he was an employee of the defendant company; worked on these work-trains that have been described here for nearly two years; has seen pieces of timber thrown from the work-trains lots of times. In answer to the question, "Have you ever seen pieces of timber thrown from the work-trains in the city limits here when the car was in motion," witness replied, "I have seen these fellows throw off wood all along the road around here, in Alexandria and Washington too. We had never been prohibited from doing that;" never heard of any of the men being prohibited from throwing timber off; does not know that they did it on the sly. The train, when they passed through Washington, was not going very fast in the city limits. The men used to watch a chance to throw off the wood. Witness means by that that they were watching to keep from hurting any one. They would catch hold of the side of the car and drop it like. The cars were flat cars.

Said Coleman, on cross-examination, testified that about two-thirds of the workmen on this train lived in Alexandria, and that the men would throw off wood sometimes 3, 4, and 5 times a week, whenever they could get a piece.

EDWARD NOBLE gave evidence in behalf of the plaintiff tending to show that he was in the employ of the defendant company in May, 1890, engaged on a work-train that has been described here; had been in the employ of the road some 20-odd years, off and on; has seen pieces of timber thrown by the workmen on that train from the car while the train was in the city limits and in motion; it was frequently done; could not say how often; it was frequently done. The practice continued, so far as witness knew, ever since the train has been run on the road

8 Witness has done it; was never prohibited from doing it until after Mr. Fletcher got hurt; never heard of anybody else having been prohibited. The train was going about as fast as a man could run. Witness threw off the timber from the train for firewood for himself to save him from buying it; has seen it thrown off both in Washington and in Alexandria. He had thrown it off in Alexandria and in Washington both, for men that lived there. Witness was on the train when this accident occurred, but did not see it happen; did not know who threw the stick off "more than what he heard." The men on the train used to say, "You want to be careful when you throw the wood off and don't hit nobody." Ab. Anderson, the foreman of the gang, used to say it and sometimes the rest of the men said it.

Said Noble, on cross-examination, testified that he himself had thrown off wood for men living in both Washington and Alexandria probably a dozen times, more or less, in ten years; that during this time the train came to Washington sometimes 4 or 5 times a week and sometimes every day, and that over two-thirds of the men employed on the train lived in Alexandria.

JOHN DOUGLASS, a witness called in behalf of the plaintiff, gave evidence tending to show that he resides in Alexandria; that he was working for the defendant in May, 1890; was working on this work-train; has seen pieces of timber such as have been described here thrown from the car of this work-train by the workmen while the train was in motion, in the city limits here; has seen it pitched off—blocks, pieces of wood, or whatever they could pick up; could not remember the number of times that he had seen them; it was whenever the men could get any they would bring it over; if they were working and had the chance to get any they would pick it up and bring it over here. The practice continued all the time he was on the road. He was on the road about 6 months—from June 1889, to January, 1890, and went on again the next season. He was never prohibited from throwing any wood and never heard any of the other workmen prohibited. Ab. Anderson, the foreman of the gang, used to tell him, "When you throw it off don't hit anybody." This wood that was thrown off was wood that they picked up down on the road; it was sometimes old pieces of ties; sometimes blocks, where they had been working on a bridge and had pieces of stuff left over; sometimes they would unload bridge timber and they would pull out the standards and keep them; has thrown off blocks in Washington "for fellows on the train."

Said Douglass, on re-cross-examination, was asked how many of the men employed on this work-train lived in Alexandria and answered, "Pretty nearly all of them; 6 or 7 of them were from Washington," and further testified that he dropped off wood once or twice in Washington for men on the train.

WILLIAM A. LYONS, a witness called in behalf of the plaintiff gave evidence tending to show that he had known the plain

9 tiff constantly since 1863 or 1864; that prior to May, 1890, witness always knew plaintiff as perfectly hearty and strong in all the working he had ever done with him, and they had worked together pretty near ever since they had been large enough to work; that since the accident in question he had worked with witness several times and he, plaintiff, wasn't able to do a good day's work, or at least he complained and said he couldn't do it. For instance, winding at a well, handling pumps, &c. His, plaintiff's, appearance since the accident is altogether different. He is nothing like the fleshy man that he was before he was hurt.

CHARLES H. BUTLER, a witness called in behalf of the plaintiff, gave evidence tending to show that before the accident in question plaintiff was a strong, hearty man, able to do almost any kind of manly labor. Witness had worked with him and never knew him to fail in any kind of hard labor before that time. Since that time he had worked with witness some. Witness is a carpenter and contractor and has hired plaintiff to do work along with him. Witness couldn't pay him as much wages as he did the others on account of his not being able to do the same work.

The plaintiff here rested his case. Whereupon the defendant, by its attorney, moved the court to direct the jury to find for the defendant; which motion, after argument, the court over the objection of the plaintiff, granted and accordingly instructed the jury that upon the whole case the plaintiff was not entitled to recover, and to return a verdict for the defendant; to which instruction the plaintiff, before the case was given to the jury, excepted and prayed the court to note said exception upon its minutes, which was done. Thereupon, the case being given to the jury, a verdict was rendered for the defendant in accordance with said instructions. Wherefore the plaintiff having prayed the court to sign this his bill of exceptions the same is accordingly done this 24th day of January, A. D. 1895, now for then.

A. C. BRADLEY, *Justice.* [SEAL.]

Settled by counsel this 23rd day — January, 1895.

ENOCH TOTTEN,
For Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss :

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing are true copies of originals in cause No. 32581 at law, wherein Richard H. Fletcher is plaintiff and The Baltimore and Potomac Railroad Company is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court
of the District of
Columbia.

10 In testimony whereof I hereunto
subscribe my name and affix the seal
of said court, at the city of Washington, in
said District, this 19th day of February, A. D.
1895.

JOHN R. YOUNG,
Clerk Supreme Court, District of Columbia.

Endorsed on cover: District of Columbia supreme court. No.
438. Richard H. Fletcher, appellant, *vs.* The Baltimore and Poto-
mac Railroad Company. Court of Appeals, District of Columbia.
Filed Feb. 25, 1895. Robert Willett, clerk.

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FRIDAY, April 19th, 1895.

RICHARD H. FLETCHER, Appellant,	}	No. 438.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.		

The argument in the above entitled cause was commenced by Mr.
F. H. Mackey, attorney for the appellant, and was continued by Mr.
W. H. Dennis, attorney for the appellee, and was concluded by Mr.
F. H. Mackey, attorney for the appellant.

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RICHARD H. FLETCHER, Appellant,	}	No. 438.
<i>vs.</i>		
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.		

Opinion of Court.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an action brought by the appellant against the appellee to
recover damages for injuries received by the former, occasioned, as
alleged, "by and through the carelessness and negligence of the def-
endant, its servants and agents," &c. The general issue plea of not
guilty was pleaded by the defendant, and there were verdict and
judgment for the defendant, and the plaintiff has appealed.

The material facts of the case are briefly, but very clearly and
fairly stated, in the brief of counsel for the plaintiff, and which state-
ment we shall adopt, with but slight addition or variation.

The evidence, as set forth in the bill of exception, tends to prove
that the defendant is a railroad company, operating a railroad from
and through the city of Washington, and as such was in the daily
habit, for eight or ten years or more, of running every morning out
of Washington and Alexandria, a repair train of open flat cars loaded
with its employees; that this train returned every evening about
six o'clock, bringing the workmen back to their homes; that these
men were allowed the privilege of bringing back with them, for
their own individual use as firewood, sticks of refuse timber left
over from their work after repairing the road, such as old pieces of
bridge timber, old cross-ties, etc.; that it was the constant and daily
habit of the men during all these years to throw off these pieces of

firewood while the train was in motion at such points on the road as was nearest their homes, where it was picked up and carried off by some member of their families, or other person waiting there for it. The only caution given the men was "that they should be careful not to hurt any one in throwing it off." This instruction was given by the foreman of the gang. On the 16th of May, 1890, the plaintiff was working at the workshops of the defendant; and he had finished his work for the day at about a quarter of six in the evening, and had started for home. When he reached the intersection of South Capitol street and Virginia avenue "he stopped to see if he could see any of the workmen coming, in order to have company on his way home; he was standing on the pavement on the south side of the railroad track,"—the track being in the middle of Virginia avenue. While standing there the repair train passed on its return from work for the day. It was moving more or less rapidly according to the testimony of the various witnesses. One of the workmen aboard the train threw from the car in which he was standing, and just as it was passing the plaintiff, a stick of bridge timber six inches square and about six feet long. It struck the ground and, rebounding, the end of it struck the plaintiff in the region of the groin, and seriously injured him, so much so that he has never been the able bodied man that he was before the accident. The morning after the plaintiff was injured orders were issued by the company that the men should throw off no more wood while the train was in motion. These facts being given in evidence to the jury, the court, upon motion of the defendant's attorney, directed a verdict for the defendant, which was accordingly rendered, and this ruling of the court constitutes the only assignment of error.

On this single assignment of error the question is, whether the facts disclosed such case of negligence on the part of the defendant as entitled the plaintiff to recover; for if, conceding the truth of the testimony, and all fair inferences deducible therefrom, the court could not perceive that there was rational ground upon which to base a verdict for the plaintiff, it was its duty to direct a verdict for the defendant, and not to subject the case to groundless and unrestrained speculation by the jury, as to the liability of the defendant, on insufficient proof.

In what, then, did the supposed negligence of the defendant consist? The defendant was not in the exercise of its ordinary business of common carrier, and the plaintiff bore no such relation to it as that of passenger. He stood simply in the relation to the defendant of a stranger rightfully on the public way or street. Nor was the relation of master and servant existing at the time of the accident, as to the running and conduct of the repair train, as between the defendant and the day laborers, who were allowed to ride home on the train after finishing their day's work. There is nothing in the evidence to show upon what terms or conditions the men were allowed to ride upon the train to and from their work, as in the case of *Vick v. N. Y. Central R. R. Co.*, 95 N. Y. 267, and the other cases cited. It is not contended that there was negligence in the humane indulgence of allowing the laborer

the privilege of bringing in on the train the refuse wood or timber gathered up along the road, to be used as fuel. Assuming knowledge on the part of the defendant, the only act of which negligence could be predicated was in allowing the men to drop or throw off from the moving train along the street, the wood brought in by them, to be taken to their homes for fuel. This, as the evidence shows, had been a practice indulged for several years, and there had never been an accident resulting therefrom before, and there had been no complaint of the habit either by the police of the city or by others; at least there is no evidence of such complaint. Under the circumstances, we do not think the mere allowing the wood to be thrown from the moving train was culpable negligence on the part of the defendant, *per se*; though, of course, the manner of throwing off the wood in a particular instance might constitute negligence. The person who threw off the piece of wood that injured the plaintiff was not in the performance of any duty required of him by the defendant, but his act was wholly independent of any duty imposed upon him by his employment to work for the defendant. In other words, his act was not within any limit or scope of authority derived from the defendant, as agent or servant in the performance of duty. If the injury was not one of pure accident, but was the result of negligence in the manner of throwing off the log, the party doing the act would be responsible therefor. It would certainly be exceedingly hard to hold the defendant company responsible, and to do so would seem to be justified by no well-settled principle of law.

There are not many cases to be found in the books that have any direct bearing upon the facts of this case. But we think the case of *Walton v. New York Central Sleeping Car Co.*, 139 Mass., 556, has a close analogy to it, and in principle goes far in the direction, if not quite to the extent, of being decisive of this case.

In that case the plaintiff was in the employ of the B. & A. Railroad Company, as a laborer and track repairer, and, on the day of the injury received, was, under the direction of the railroad company, rightfully on its tracks, engaged in the performance of his duties, and in the exercise of due care, when an express train passed rapidly by, on an adjoining track, and a bundle thrown from the passing train hit the plaintiff, and caused the injuries complained of. In this express train was a parlor car, owned by the defendant, the sleeping car company, carried on special terms. The defendant employed on the car a conductor, who collected the fares for seats, and had general charge and management of the car; and a porter, one Maxwell, whose business it was to take charge of the car, keep it clean and in order, serve the passengers, and remove rubbish from the car, and who was under the conductor. He was allowed by the defendant to bring in, and keep in a closet in the car, where articles of the defendant were also kept, a satchel and other articles of his own, to which closet he had a key. As this car was passing through Newton on the day of the accident, Maxwell went out upon the platform of this car, and threw off a paper bundle containing soiled clothing belonging to himself, together with a paper box con-

taining some articles of his own. It appears that Maxwell, the evening before, had arranged with a woman, living near by, to throw the bundle at this point from the train, so that she could get it and to wash the soiled linen. This bundle so thrown struck the plaintiff and inflicted the injury. Maxwell had never thrown a bundle in that way before. He had no duty in regard to the washing of the linen used in the car, which was washed in Boston, and attended to by other servants than Maxwell. Maxwell testified that no person directed him to throw off the bundle, and that he threw it off for his own convenience solely.

The plaintiff asked the trial judge to rule that, on the facts stated, he was entitled to recover. But the judge refused so to rule, and, instead thereof, ruled as follows:

"The defendant is not responsible, if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant, in the scope of his employment. If Maxwell was employed by the defendant as a porter upon its parlor car, and, wholly for a purpose of his own, and disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw a bundle, his own property, from the platform of the parlor car, and thereby the plaintiff, who was not a passenger, was hit and injured while in the exercise of due care, and if this injury was done by Maxwell not within the scope of his employment, then the defendant is not liable. If, however, Maxwell negligently threw the bundle in the execution of the authority given him by the defendant, and for the purpose of performing what the defendant had directed, or if the injury to the plaintiff was done by Maxwell while acting within the scope of his employment, then the defendant would be liable."

The judge also ruled, that, upon the whole evidence, the plaintiff was not entitled to recover. And upon a review by the supreme court of the State, it was held that these rulings were correct; and in a brief opinion by the supreme court, it was said:

"The rulings and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was, at the moment, riding in a car of the defendant in which he was employed by it for other purposes."

That case, it seems to us, was rightly decided, and decided upon principle that is applicable here. If the owner of the parlor or sleeping car in that case was properly exempt from liability, it is difficult to perceive why, or upon what principle, the defendant in this case should be held liable.

The case mostly relied upon by the plaintiff is the case of *Snow v. Fitchburg R. Co.*, 133 Mass., 552. But that case presents 14 features quite distinguishable from the case before us. There the plaintiff was a passenger on the defendant's road; and while waiting in a proper place and using due care, on the platform

at the station of the defendant, to make a necessary change from one train to another, the plaintiff was struck and injured by a mail bag thrown from a rapidly passing train by a United States mail agent. And, as declared by the court, "there was evidence in the case tending to show that mail bags had not unfrequently been thrown from that car, in such a way as to strike upon the platform where the plaintiff stood; and if such evidence was believed, the court was justified in inferring that the defendant knew, or, in the exercise of proper care, ought to have known this." That, therefore, was simply a negligent and dangerous manner of performing a duty owing to a passenger by a railroad company. The company was bound to exercise towards the plaintiff in that case, "such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent." And though the mail bag was thrown out by the United States mail agent, yet it was the duty of the railroad company to provide for and see to the safe and proper delivery of the mail bag from the train, so that it should not imperil the life or limbs of the passengers on its trains. That case, we think, does not in any manner control in the decision of the present case.

We are of opinion that the court below, upon the facts before it, was correct in directing the verdict for the defendant; and the judgment must therefore be affirmed.

Judgment affirmed.

15

MONDAY, *June 3rd*, A. D. 1895.

RICHARD H. FLETCHER, Appellant.	} No. 438. April Term,
<i>vs.</i>	
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.	

1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE ALVEY.

June 3, 1895.

MONDAY, *June 17th*, A. D. 1895.

RICHARD H. FLETCHER, Appellant,	} No. 438.
<i>vs.</i>	
THE BALTIMORE AND POTOMAC RAILROAD COMPANY.	

On motion of Mr. F. H. Mackey, attorney for the appellant in the above-entitled cause, it is ordered that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

16 Know all men by these presents that we, Richard H. Fletcher, as principal, and James P. Nalls, as surety, are held and firmly bound unto The Baltimore and Potomac Railroad Company in the full and just sum of three hundred dollars, to be paid to the said The Baltimore and Potomac Railroad Company or its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Scaled with our seals and dated this 19th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Richard H. Fletcher, appellant, and The Baltimore and Potomac Railroad Company, appellee, a judgment was rendered against the said Richard H. Fletcher, and the said Richard H. Fletcher having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said The Baltimore and Potomac Railroad Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Richard H. Fletcher shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

RICHARD H. FLETCHER. [SEAL.]
J. P. NALLS. [SEAL.]

Scaled and delivered in the presence of—
FRANKLIN H. MACKEY.

Approved by—
R. H. ALVEY,
Chief Justice.

This is satisfactory.

ENOCH TOTTEN.
For Def't in Error.

[Endorsed:] No. 438. Richard H. Fletcher, appellant, *vs.* The Baltimore & Potomac Railroad Co. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jul-23, 1895. Robert Willett, clerk.

17 UNITED STATES OF AMERICA, *ss* :

To the Baltimore and Potomac Railroad Company, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein

Richard H. Fletcher is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 23d day of July, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
*Chief Justice of the Court of Appeals
of the District of Columbia.*

Due service of the above citation admitted this 23d of July, 1895.

ENOCH TOTTEN,
For B. & P. R. R. Co.

[Endorsed:] Court of Appeals, District of Columbia. Filed July 23, 1895. Robert Willett, clerk.

18 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable judges of the Court of Appeals of the District of Columbia, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Richard H. Fletcher, appellant, and The Baltimore and Potomac Railroad Company, appellee, a manifest error hath happened to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Seal Court of Appeals,
District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

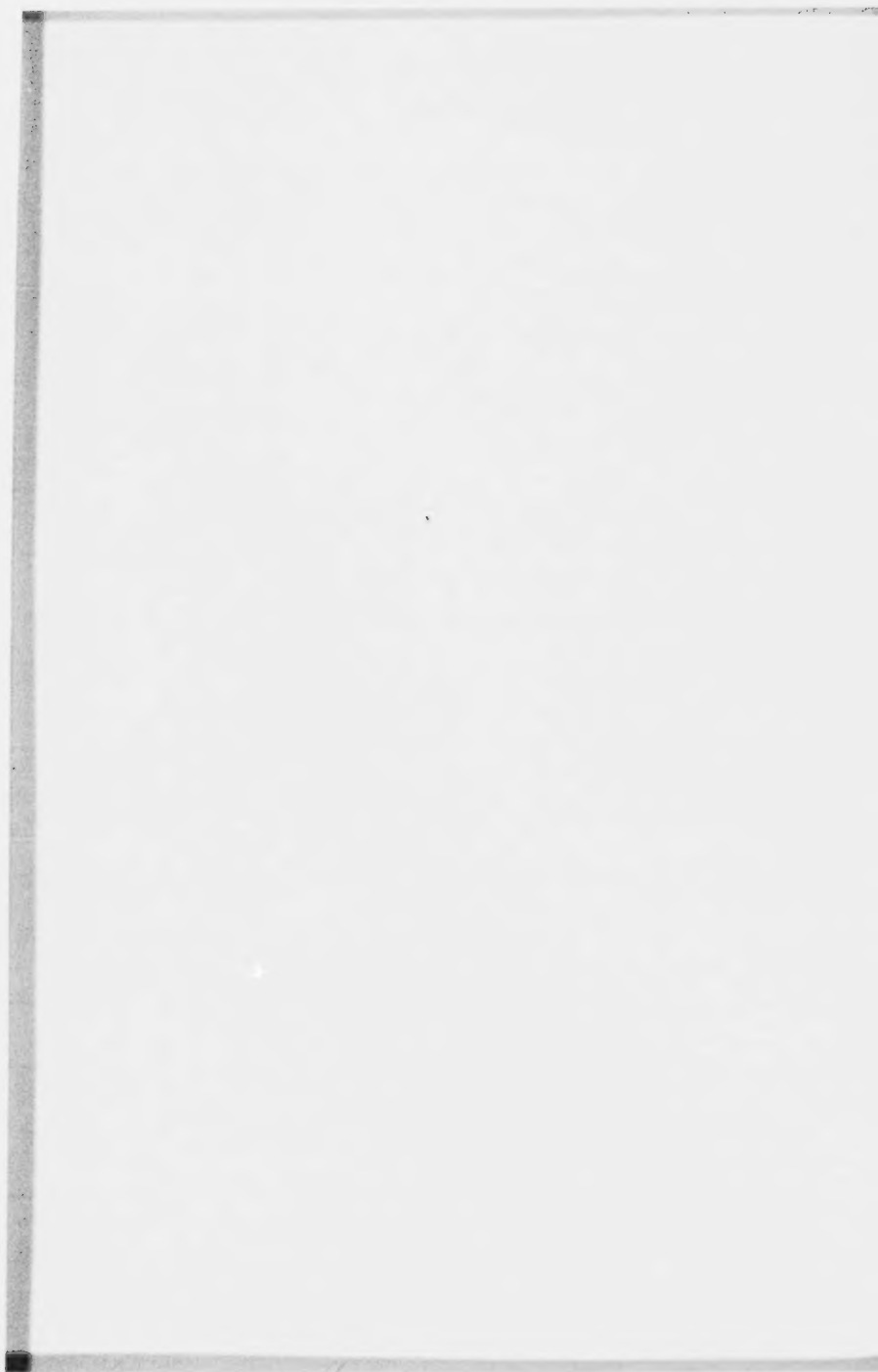
19 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and type-written pages, numbered from 1 to 18, inclusive, contain a full and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of Richard H. Fletcher, appellant, *vs.* The Baltimore and Potomac Railroad Company, No. 438, April term, 1895, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 27th day of July, A. D. 1895.

ROBERT WILLETT,
*Clerk of the Court of Appeals of the
District of Columbia.*

Endorsed on cover: Case No. 16,006. District of Columbia Court of Appeals. Term No., 56. Richard H. Fletcher, plaintiff in error, *vs.* The Baltimore and Potomac Railroad Company. Filed August 24, 1895.



No. 56.

25-

OCT 4 1897
JAMES H. MCKENNEY

Brief of Mackey for P. C.

Filed Oct. 4, 1897.

82
J. C.

IN THE
Supreme Court of the United States.

RICHARD H. FLETCHER,
Plaintiff in Error,

vs.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
Defendant in Error.

No. 56.

Writ of Error to the Court of Appeals of the
District of Columbia.

Brief for Plaintiff in Error.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.



IN THE
Supreme Court of the United States.

RICHARD H. FLETCHER,
Plaintiff in Error,

vs.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY,
Defendant in Error.

No. 56.

**Writ of Error to the Court of Appeals of the
District of Columbia.**

BRIEF FOR PLAINTIFF IN ERROR.

I.

This was an action to recover damages for injuries received by the plaintiff in error "by and through the carelessness and negligence of the defendant, its servants and agents."

After the close of the plaintiff's case in chief, the court at the request of the defendant instructed the jury to find a verdict for the defendant.

Assignment of Error.

The court below erred in instructing the jury, at the close of the plaintiff's case in chief, to find a verdict for the defendant.

Statement of Case.

The record shows that on the 16th of May, 1890, the plaintiff was working at the workshops of the defendant. He had finished his work for the day at about a quarter of six in the evening and had started for home. When he reached the intersection of South Capitol street and Virginia avenue "he stopped to see if he could see any of the workmen coming, in order to have company on his way home; he was standing on the pavement on the south side of the railroad track." While standing there one of the defendant's repair trains passed on its return from work for the day. It was moving more or less rapidly according to the testimony of the various witnesses. One of the workmen aboard the train threw from the car in which he was standing, and just as it was passing plaintiff, a stick of bridge timber six inches square and about six feet long. It struck the ground and, rebounding, the end of it struck plaintiff in the region of the groin, and seriously injured him, so much so that he has never been the able-bodied man that he was before the accident. The morning after the plaintiff was injured orders were issued by the Company that the men should throw off no more wood while the train was in motion.

The evidence (R. 6,) shows that "one of the workmen [on the train] by the name of George Washington threw it [the stick of bridge timber] off."

There was no evidence as to the purpose for which Washington threw off this stick of bridge timber; whether it was to subserve his own purpose or that of his employer does not directly appear. The plaintiff, however, contends that under the rule *res ipsa loquitur* he has shown *prima facie* the negligence of the defendant when he shows that the timber was thrown by one of the defendant's workmen from the defendant's moving train, and the resulting injury. If it be a defence that the workman in this instance was not acting in behalf of the defendant, *i. e.*, was acting beyond the scope of

his special employment, that is a fact which should appear from the evidence. *Prima facie* when a train hand throws from the train a piece of bridge timber which is being carried upon the train he is acting in behalf of his employer and when a resulting injury occurs to a by-passer *res ipsa loquitur*, negligence is presumed.

See Am. Ency. Law, Vol. 16, p. 449 (1st ed.), note 1.

Cooley on Torts, 1227-1235.

Shear and Red Negl. §59.

64 Am. Decisions, 502 note.

II.

But even if the workman, Washington, is to be presumed to have thrown off this piece of timber for his own benefit, yet the evidence as to the long continuance of such a custom or practice among the workmen was sufficient to allow the jury to presume that the defendant knew of the practice and permitted it to be done. The evidence upon this point was that the defendant corporation was in the daily habit, for eight or ten years or more, of running every morning out of Washington and Alexandria, a "repair train" of open flat cars loaded with its employés; that this train returned every evening about six o'clock bringing the workmen back to their homes; that these men were allowed the privilege of bringing back with them, for their individual use as firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, old cross ties, etc., that it was the constant and daily habit of the men during all these years to throw off these pieces of firewood while the train was in motion at such points on the road as was nearest their homes where it was picked up and carried off by some member of their families, or other persons waiting there for it. The only caution given the men was "that they should be careful not to hurt anyone in throwing it off." This instruction was given by the foreman of the workmen.

The plaintiff's contention is that this practice of throwing wood from the moving trains had continued for so long a time (eight or ten years), was so frequent, so open, and so notorious, that knowledge of the practice might well have been imputed by the jury to the defendant, and it was error not to permit them to consider the question. For if the defendant knew or should have known of its existence, and that its train was being constantly used as a necessary means of carrying on a dangerous practice to by-passers; knew that this was being done by men in its employ, and knew that it had the power to prohibit it, yet nevertheless did not prohibit it, then it is liable to respond in damages to the plaintiff.

"The law requires of persons having in their custody instruments of danger [and a rapidly moving railroad train is an instrument of danger] that they should keep them with the utmost care. 1 Hill, Torts (3rd ed.) 127. Sometimes, says Pollock, the term 'consummate care' is used to describe the amount of caution required; but he says it is doubtful whether even this be strong enough. At least we do not know any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him. Pol. Torts 407; see also Whart. Neg. 851. And it stands to reason that one charged with a duty of this kind cannot devolve it upon another, so as to exonerate himself from the consequences of injury being caused to others by the negligent manner in which the duty in regard to the custody of such an instrument may be performed. Speaking of the absolute duty imposed by statute in certain cases, as also the duties required by common law of *common carriers*, of owners of dangerous animals, or other things involving, by their nature or position, special risk of harm to neighbors, Pollock observes: 'The question is not by whose hand an unsuccessful attempt was made, whether that of the party himself, of his servant, or of an 'independent contractor,' but whether the duty has been adequately performed or not. Pol. Torts 64.'"

Walker *vs.* Hannibal & St. R. R. Co., 26 S. W. Rep. 363.

In the case at bar we have a moving train of cars passing through the streets of a populous city. The master—a Rail-

road Company—knew, or should have known, that its employés were using this train as a means of carrying home their firewood and that they were constantly throwing this wood from the moving cars to the great danger of pedestrians. Instead of forbidding this to be done, it rather encouraged it, the only caution imposed being “that they should be careful not to hurt anyone.” This practice of its employés was kept up for years and was a thing of daily occurrence, no effort was made to stop it, and no rule made in regard to it. Can it be said under such circumstances that the defendant exercised proper caution in the use of its property?

The declaration charges that the plaintiff was injured “by and through the carelessness and negligence of the defendant, its servants and agents.” It is submitted that the facts in evidence abundantly tend to prove the charge and that the court erred in not permitting the evidence to be considered by the jury.

There are two maxims of the law which are plainly applicable to this case, namely:

Sic utere tuo ut alienum non laedas.

Qui non prohibet, cum prohibere possit, jubet.

When a railroad company undertakes the business of running its trains through and along the busy streets of a crowded city the duty is at once imposed upon it of exercising such a degree of care in the management of its trains as will eliminate as far as it is reasonably possible every known element of danger to pedestrians, and if instead of doing this it knowingly permits its employés who are aboard these moving trains to use them in a manner dangerous to persons passing upon the streets, as for instance to permit them to habitually carry sticks of firewood upon the train and to throw them from the cars while in motion, though it be for their (the employés) exclusive benefit, the company will be liable if any person is injured thereby, for whenever and wherever a person is charge-

able with proper care in the use of his property, he is, under the maxim *sic utere, etc.*, liable if he knowingly permits his employés to use it in a manner dangerous to the public where injury results from such use. What the particular piece of property is which is thus used, or the manner in which it is used is of no consequence if the use to which it is put is a dangerous one. It may be dynamite, or it may be a moving train of cars, or it may be a thing harmless when used for one purpose and dangerous when used for another, such as we might conceive a train of flat cars—harmless when used for legitimate purposes, but dangerous when used for carrying home workmen with sticks of firewood which they are in the habit of throwing from the moving cars into the public streets. In such cases it is the master's business to take proper precaution that his employés do not use his property in a dangerous manner, or as it is frequently said "When the master sets a dangerous agency in motion he must control it." And more especially is this care and diligence imposed upon a corporation when running its trains through a populous city.

"Railroads operating their franchises in populous cities, and over and along public thoroughfares, where the hazard to persons and property is great, will be held to a high degree of caution and skill, commensurate with the extra hazard."

Toledo Wab. & West. R. R. *vs.* Harmon 47 Ill., p. 298.

In Wood on Master and Servant, Sec. 321, it is laid down as a rule of law that in that class of cases where the master owes certain duties either to third persons or the *public*, whether the same arises from contract or statutory obligations he becomes absolutely responsible for the *manner* in which the duty is performed, precisely as though he himself had performed it, and this without any reference to the question whether the servant was *authorized* to do the particular act. Wood M. & S. Sec. 321.

In accordance with this rule it was held by this Court in *Railroad vs. Derby*, 14 How. 468, that where the servant of a railroad company took an engine and ran it over the road for his own gratification, not only without consent, but contrary to express orders, the railroad company was responsible. So in *Railway vs. Hinds*, 53 Penn St. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held liable, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate by an earnest effort that it was impossible to do so.

In the case at bar we have seen that the defendant Railroad Company owed a duty to the public which duty was to run its train through the city with the least possible danger to pedestrians. Now can it be said that it is performing its duty to the public when it permits its employes habitually to throw logs of wood from its moving cars into the public streets to the injury of persons who may happen to be passing? Surely not, the doctrine *qui non prohibet, cum prohibere possit, jubet* applies in such a case with all its force. Who is responsible in such a case? Judge Cooley answers the question; he says:

"Passing now to the class of unintended wrongs, we find them to consist most commonly in the *neglect* to perform some *duty*, which the party has assumed by contract, *or which the law has imposed* because of official position or some special relation. In such cases * * * the person who in legal contemplation is the wrong doer is the person who was burdened with the duty, and who has failed in its performance." Cooley, Torts 162.

Scope of Employment Not the Question.

It was held by the court below that because these pieces of wood were being carried by the workmen for their personal uses and not for any purpose of the defendant they could not be said

to be doing anything within the scope of their employment, and on the principle that the master is not liable for any act of the servant done for his (the servant's) benefit and not within the scope of his employment the defendant could not be held to respond in damages to the plaintiff. The court thus lost sight of the important element of this proposition, *i. e.*, whether this practice was carried on with the permission and *authority* of the defendant. This feature of the case was lost sight of by the court, and not only this but still another important matter was ignored—namely, that there is a great difference between an *isolated* act done by an employé who had given his master no reason to suppose that the act would be done, and an act done in pursuance of a long established practice or custom which the master knew of and had never prohibited.

In *Snow vs. Fitchburg R. R. Co.*, 136 Mass. 552, the plaintiff who was standing on the platform of the station was struck by a mail-bag "thrown," says the report of case, "*in accordance with a custom known to the corporation*" by a mail-agent in the employ of the United States, from a mail car belonging to the corporation on one of its express trains running at a high rate of speed." It was held that the plaintiff could recover. Said the court.

"The defendant voluntarily furnished a car to run on its express train, from which it *knew* that mail-bags were to be thrown at the station where the plaintiff was when the train was under full speed. Obviously unless good judgment and great care were used by the mail-agent in throwing out the bags * * * danger was likely to result to passengers on the platform of the station.

"*There was evidence in the case tending to show that mail-bags had not unfrequently been thrown from this car, in such a way as to strike upon the platform where the plaintiff stood and if this evidence was believed, the court [jury] was justified in inferring that the defendant knew, or in the exercise of proper care, ought to have known this. It was within the power of the defendant to prevent this practice of throwing out mail-bags, if in no other way by withholding the use of the car, or by stopping the train at the station.*"

This case, it is submitted, is "on all fours" with the case at bar. The record here shows that there was evidence before the jury that these billets of wood had been habitually and for a long period of time, thrown by the defendant's employes from this repair train while in motion, and the jury might well have inferred, had they been allowed to consider the evidence, "that the defendant knew, or in the exercise of proper care, ought to have known, it." So too, to use the very language of the Massachusetts case, "It was within the power of the defendant to prevent this practice." But so far from issuing an order prohibiting it, there were facts, as we have seen, from which the jury would have been justified in inferring that the defendant permitted it to be done.

The case of *Walton vs. New York Central Sleeping Car Co.*, 139 Mass. 556, was strongly relied upon by the defendant in the court below. But nothing can be clearer than the difference between the facts of that case and the case at bar. In that case Maxwell, the porter of a parlor car belonging to the defendant, had arranged with a young woman to throw from the car as it passed near her mother's house a bundle of soiled clothing. The report of the case says "*he had never thrown a bundle before,*" meaning, of course, from the car while in motion.

This bundle hit the plaintiff who was standing on the adjoining track as the car rapidly passed. Maxwell testified that he threw off the bundle for his own convenience, and that nobody instructed him to do so. The court held that the defendant was not responsible "*if the injury to the plaintiff was done by Maxwell * * * without the authority of the defendant,* and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment."

The case, therefore, was radically different from the case at bar. Two of the most important facts, the very *turning points* of the case at bar, were absent from this Parlor Car case. In

that case it was an *isolated* act, it was shown that the employé had never before thrown objects from the car while in motion. In the case at bar there was evidence going to show it to have been the long and constant practice of the employés. In the Parlor Car case the employé acted *without the authority of the defendant*. In the case at bar there was evidence (*viz.*, the frequency and long continuance of the practice) from which the jury could have inferred that it was done with the *implied* if not express authority of the defendant. Suppose it had been shown that for years it had been the constant practice of the employés of the Sleeping Car Company to throw their bundles of soiled linen from the cars while in motion and that no rule of the Company had ever issued to prohibit it? Would not the ruling of the court have been quite different? *A fortiori* it would have been so if instead of bundles of soiled clothing it had been their habit to throw off their firewood in the shape of pieces of bridge timber, old cross ties and the like.

Another feature of the case at bar completely ignored by the court below was that which we have already endeavored to establish, *viz.*, that where the master undertakes to operate with dangerous agencies, he must control these agencies and cannot escape liability when it is shown that he was negligent in the *care* of the agency with which he has chosen to operate. Thus in *Walker vs. Hannibal & St. Joe R. R.*, 26 S. W. Rep. 363, certain of the defendant's employés took a number of torpedoes kept by the defendant for use in the conduct of its business, and for their own amusement exploded them, for the purpose of playing a joke upon some lady passengers aboard the train. The torpedoes were laid upon the rails at the station and, as the cars moved out, exploded to the great alarm of the ladies and amusement of the employés. It appears that one of the torpedoes fell from the rail and consequently was not exploded. It was afterwards picked up by some boys, one of whom was almost immediately injured in the endeavor to find out what it was. Suit was brought and the company was

charged with negligence in leaving so dangerous an article as a torpedo upon the railroad track. The defense was that it was left there not by the company in the prosecution of its business, but by certain of its employés for their own amusement, and not in the proper course of their employment, and the doctrine was invoked that the master is only liable for the servant's negligence when the act done is in the scope of his employment, but the court held that torpedoes were dangerous instruments and that it was the duty of the defendant company to keep them with the utmost care, and if it committed them to the care of servants who used them carelessly even though for their own benefit or amusement, it was liable for resulting injuries to third persons. In the course of the opinion the court used the language which will be found on page 4 of this brief.

But leaving out of the case one of the most important elements in it, namely, the degree of care imposed upon a person operating with dangerous agencies, and treating it as a case purely of master and servant, we find it quite a different case from that which the court below seems to have regarded it, for this is not a case where a servant employed by the master for a particular service, undertakes without the knowledge or consent of the master to do something beyond the sphere of his employment, and from which an injury results to a third person. It is quite a different case. It is the case where a *number* of servants, repeatedly and continuously through a long course of years, use with the master's knowledge and implied consent, the master's property for a hazardous purpose.

If the practice of the company's employés in respect of throwing wood from its moving trains, had not been *long continued*, if it had been rarely done, and was exceptional rather than habitual and when brought to the knowledge of the company had been prohibited, or if it had been an isolated and single act which the company had no just reason to expect would have been done, quite a different case would have been presented.

To formulate the law of this case into a compact legal proposition, it may be stated as follows :

1. Where a number of servants, *with the master's knowledge and implied consent*, habitually use the master's property in a manner likely to result in injury to persons lawfully on the public thoroughfare, and it is in the master's power to prohibit his servants from so using his property, and he does not do so, he is liable if injury results to any such persons from such practice, even though the practice itself was entirely out of the sphere of the servant's employment.

2. Whether the master had knowledge of the practice and consented thereto, *are questions for the jury* from all the circumstances of the case, and among such circumstances would be the frequency of the practice, the number of men engaged in it, its long continuance, its notoriety and the like.

3. These principles apply with greater force when the master is a railroad corporation operating a railroad in a populous city, and its moving trains are used with its knowledge, by its employés for dangerous purposes of their own.

It is submitted, therefore, that the court erred when it took these questions from the jury.

III.

The Fellow-Servant Doctrine.

It remains only to refer briefly to one point raised by the defendant in the court below, and which, although it was rejected as a proposition of law by the learned judge, may be brought forward again in this court. It was argued that the plaintiff was an employé of the defendant, and that as the men who threw the sticks of wood were also employés of the same master, they must be deemed fellow servants. But this proposition cannot be maintained under the facts. The plaintiff had finished his day's work and was on his way home and it is well settled that a workman is not a fellow servant to other

workmen when he has finished his work and left his place of employment and is on his way home. See *Balt. & O. R. R. vs. Trainer*, 33 Md. 542, 554; *Baird vs. Pettit*, 70 Pa. St. 477, 483; *Hurst vs. C. R. I. & P. R. R.*, 49 Iowa 76.

A point also sought to be made by the defendant in the court below was that because Washington's "days work had been done and he was on his way home, as was the plaintiff," he was not at that time in the employ of the defendant, and therefore the relation of master and servant did not exist. But this cannot be maintained under the authorities. Fletcher's case was quite different from Washington's; Fletcher had left *his place of employment* and was on his way home, and, as we have shown by the authorities cited on p. 12 of plaintiff's brief, this put an end for the time being to the relation of master and servant, between the defendant and Fletcher. But the relation still continued as to Washington. The authorities all hold that railroad hands *who are carried on the company's trains to and from their work* are in the employment of the company until they *leave the train*, although they have finished their work for the day and are on the train only for the purpose of being brought back to their homes.

Vick vs. New York, etc., R. R., 95 N. Y., 267.
Russell vs. Hudson River R. R., 17 N. Y., 134.
Gillshannon vs. Stonybrook R. Co., 10 Cush, 228.
Bryan vs. Cumberland V. R. Co., 23 Pa. St., 384.
Prather vs. Richmond & D. R. R., 80 Ga., 427.
Kumler vs. Junction R. R., 33 Ohio St., 150.

And the same is the rule in England.

Tanney vs. Midland Ry. Co. L. R., 1 C. P., 291.

IV.

The Opinion of the Court of Appeals.

The court below proceeding upon the assumption that the throwing of the wood from the moving train was, as contended

by the plaintiff, a continued practice, says : p. 391, Appeal Cases D. C., Vol. 6.

" Assuming knowledge on the part of the defendant [of this practice], the only act of which negligence could be predicated was in allowing the men to drop or throw off from the moving train along the street, the wood brought in by them, to be taken to their homes for fuel. This *as the evidence* shows had been a practice indulged in for several years, and there had never been an accident resulting therefrom before, and there had been no complaint of the habit either by the police of the city or by others. Under the circumstances we do not think the mere allowing the wood to be thrown from the moving train was culpable negligence on the part of the defendant *per se*, though of course the manner of throwing off the wood in a particular instance might constitute negligence."

The criticism to be made of this view of the question is :

1. That whether the throwing off of the wood was negligence or not depended upon all the circumstances of the case, and these circumstances was a *question for the jury* and not for the court.

2. That it is difficult to see how the fact that nobody had ever before been injured and hence nobody had ever before complained (if these be facts for there was no evidence one way or the other about them) can exculpate the defendant when at last an injury does result.

3. Nor can we see how it can be held not negligence *per se*, for the defendant to allow its workmen to throw from its rapidly moving trains (one witness said twenty miles an hour) pieces of bridge timber, old cross ties, etc., in the streets of a populous city. The very fact that the foreman told the men that in throwing off the wood they must be careful not to hurt any one is evidence that the practice was considered so dangerous as likely to hurt the by-passers unless care was taken.

Another criticism to be made of the opinion of the court is based upon the following language to be found therein, p. 392.

"The person who threw off the piece of wood that injured the plaintiff was not in the performance of any duty required of him by the defendant, but his act was wholly independent of any duty imposed upon him by his employment to work for the defendant. In other words the act was not within any limit or scope of authority derived from the defendant, as agent or servant in the performance of duty."

It is conceded there was no evidence as to the purpose of the workman, Washington, in throwing off this piece of bridge timber from the moving train. How then can the court assume that he, a workman in the employ of the defendant, was not acting in the scope of his employment? We submit the assumption is directly the other way. Given a moving train manned by the defendant's employés it must be presumed, until the contrary is shown, that when the workmen are found throwing off bridge timber from the train they are acting in behalf of the defendant and under its authority. But the question back of all this is that it was for the *jury* and not for the court to pass upon the evidence and say whether the workman was acting within the scope of his employment, and also whether the use of the train for such a purpose was dangerous, and if so whether it was sanctioned by the defendant. If these facts had been found against the defendant it is surely law that it cannot escape liability to one who suffers from its knowingly permitting its workmen to use its trains for purpose found by the jury to be dangerous.

It is further submitted that the distinction made by the court below between the mail car case (136 Mass., 552), and the case at bar, viz : that in the mail car case the person injured was a passenger and in the case at bar a by-passer is not tenable. There can be no doubt that it would have made no difference in the finding of the Massachusetts Court if the injured party had been a by-passer instead of a passenger.

"It is not proper for the Court to instruct the jury 'that upon the whole evidence the plaintiff ought not to recover'

if *any possible construction of the testimony* would support the the verdict."

Bank of Washington *vs.* Triplett, 1 Peters 25.

FRANKLIN H. MACKEY,

Attorney for Plaintiff in Error.

No. 56.

Brief of Mackey for P.E. (reply)

Filed Oct. 18, 1894.

Supreme Court of the United States

U. S. Supreme Court, U. S.

FILED

OCT 18 1894

JAMES H. MCKENNEY,
CLERK.

No. 56.

RICHARD H. FLETCHER

vs.

THE BALTIMORE AND POTOMAC RAILROAD
COMPANY.

Brief for Plaintiff in Error in Reply to Brief for
Defendant in Error.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.



IN THE
Supreme Court of the United States.

No. 56.

RICHARD H. FLETCHER

vs.

THE BALTIMORE AND POTOMAC RAILROAD
COMPANY.

**Brief for Plaintiff in Error in Reply to Brief for
Defendant in Error.**

The case at bar, involving, as it does, a question of considerable interest in point of law, aside from its importance to the plaintiff in error, will, it is believed, excuse us if we undertake to examine some of the positions taken by defendant in error in his brief, and which we have had no opportunity to discuss in the light of that brief.

In the first place, in criticising *Snow vs. Fitchburgh R. R. Co.*, 136 Mass., 555, defendant's counsel argues (p. 8) as a justification for the decision in that case that—

“It is evident that in furnishing a mail car on this express train the Fitchburg railroad *must have known* that it would be used for the very purpose of delivering mail bags, and from the statement of the case it seems that it had *actual notice* that mail bags would be delivered at this station, and

as it *knew* in making its time-tables that its own train did not stop there, it *knew* that the mail bag must be flung off at full speed."

This is precisely the argument we have used in the case at bar. We say that from the evidence of the frequency of the acts of the workmen in throwing wood from the rapidly moving train, taken with the fact that the foreman had cautioned the men to throw it carefully "so as not to injure any one," and the long continuance of the practice through several years, the jury would have been justified in finding that the defendant "must have *known* that it (the train) would be used for the very purpose" of throwing—not mail bags, but huge pieces of timber. Defendant's counsel, we presume, will admit that the likelihood of injury if one is struck by a piece of bridge timber is much greater than if he were struck by a leather mail bag.

Again, defendant's counsel says (p. 10):

"Why should we not assume that this piece of bridge timber was properly and lawfully on the car and that George Washington threw it at the plaintiff wantonly or for the purpose of injuring him or scaring him."

We reply that it is perfectly proper to assume that "this piece of bridge timber was properly and lawfully on the car." Indeed, it would be improper to *assume* that the defendant had it there improperly and unlawfully; being there, then, properly and lawfully, one of the defendant's workmen threw it from the car while the train was moving rapidly, and just as we are compelled to assume that the bridge timber was properly on the car, so, on the same principle, we are compelled to assume that this workman, being in the employ of the defendant at the time he threw it from the train, threw it in the discharge of the duties of his employment. If it was not within the scope of his employment that was matter of defense to be shown by the defendant. We show the defendant's workman throwing a piece of

bridge timber from a train where it properly was. Why shall we assume he threw it off wantonly, and why shall we not assume, upon the principle that all things are presumed to be done rightly until the contrary appears, that this workman had the authority of his master to throw this piece of timber from the car? And is not all this a question for the jury rather than for the court? If he had such authority and did it negligently the master is liable, of course.

But defendant's counsel says: "There was no possible color of discharging his duty on the part of the man who threw off the bridge timber. *His day's work was over*, and the timber was *no part of the load which had been on the train*." We have in our principal brief (p. 13) shown by the authorities that a railroad hand when carried on a train to do work along the road does not when he is being brought back to the depot or station at the close of the day cease to be in the master's employ until he reaches the depot and leaves the train. So that this train hand's "day's work" *was not over* until he reached the depot at Washington. We also submit that defendant's counsel, having just asked us to assume that the bridge timber was properly on the train, can hardly be heard to argue that the bridge timber "was no part of the load which had been (*sic*) on the train."

The authorities cited at top of page 11 to the point that a master is not liable for the act of a servant done by the latter to gratify his, the servant's, private hate, &c., doubtless support that proposition; but it is difficult to see what application they can have to the present case, since there is not a scintilla of evidence that this workman threw this piece of bridge timber at the plaintiff to gratify his, the workman's, private hate. If the defendant contends it was done for that purpose he should have given some evidence tending to show it.

The defendant says: "Suppose a laborer riding home on a train of cars loaded with coal, passing through the city, should, mischievously or otherwise, throw a chunk of coal

at a person on the street and injure him, would the railroad company be liable for the injury?"

Certainly not, if he purposely threw it *at* him. There is no evidence that Washington *purposely* threw this bridge timber *at* Fletcher; but let us suppose it had been the custom for years for the workmen to throw off large pieces (a foot or more square) of this coal as the rapidly moving train passed their houses; and that this coal was thrown off by them for fuel; and that the custom was *well known* to the railroad officials; and that they permitted it to be done with no other caution than that they, the workmen, should "be careful not to hurt any one." Then, suppose on one of these days one of these workmen is seen to throw off in the customary manner a large chunk of coal which, rebounding, struck a passerby. Will it be said that the burden was not then on the company to show (if such were its defense) that the workman did this wantonly for the purpose of injuring the by-passer? And if this were not shown would not the jury have a right, from all the evidence of the custom, to conclude that the workman was *permitted* by the company thus to use the company's property, to the great danger of the public, with no other caution than that "he should be careful?"

O'Neill *vs.* Keokuk, etc., R. R. Co., 45 Iowa, 546 (cited by defendant's counsel, p. 12 of his brief), so far from supporting him, is directly in favor of plaintiff's contention, for while it is there said that "a violation of a rule of the company is not admissible to establish a waiver of the rule," this correct proposition is immediately qualified by the words "*unless* it be shown that the custom was *known* to the officer charged with the enforcement of the rule." Now, in the case at bar the evidence is that the foreman not only *knew* of this practice of throwing off heavy pieces of timber, but actually *sanctioned* it by telling the men "to be careful not to hurt any one" while they were doing it.

The illustration of the lighted pipe and the match (p. 12)

is not all in point. Throwing a match weighing the one one-hundredth of an ounce from a moving car bears no comparison to throwing a piece of bridge timber weighing possibly fifty or a hundred pounds.

THE PROOF CONFORMED TO THE DECLARATION.

The citation from Chitty (p. 15 of defendant's brief) is a complete answer to the contention that plaintiff should have alleged the custom in his declaration. "The negligence of the servant," says Chitty, "may be stated as that of the master." In our declaration we charge that the injury was committed "by and through the negligence of *the defendant*," &c. This permits us to prove that the master was guilty of negligence in *knowingly permitting* his servant to use the master's railroad train (a dangerous instrument) and the master's bridge timber in a negligent manner dangerous to the safety of the public and while the servant was in the employ of the master.

Again (p. 15), defendant's counsel says: "The proof showed that the alleged servant of the defendant was not acting as its servant at the time of the injury." In reply we say that whether he was acting as the defendant's servant at the time of the injury was a question for the jury. We say the proof shows that he was acting *as such servant*. The defendant denies this. Who shall decide this mixed question of law and fact but the jury under the instructions of the court as to the law? But the court took unto itself the determination of both these questions, ignoring the province of the jury entirely, and it is of this that we complain.

Lastly, the fellow-servant doctrine, as announced by the learned counsel, is so fully replied to in our principal brief (p. 12) that we need only refer to that.

Respectfully submitted.

FRANKLIN H. MACKEY,
Attorney for Plaintiff in Error.



No. 56.

App^y to Br. of Mackey
Filed Oct. 26, 1894.

IN THE

Supreme Court of the United States.

RICHARD H. FLETCHER
^{vs.}
THE BALTIMORE AND POTOMAC R. R. } No. 56.

Correction of Error in Citation in Appellant's Brief.

The case cited on pages 4 and 10 of appellant's brief as Walker *vs.* Hannibal & St. J. R. R., 26 S. W. Rep. 363, should be Railway *vs.* Shields, 47 Ohio State Rep. 387.

The case of Walker *vs.* Hannibal & St. J. R. R. is now reported in 121 Mo. 575 and is the case referred to on the argument as the "drill case," *i. e.*, where an iron drill was thrown from the car by the baggage man injuring a by-stander who brought suit to recover for said injuries.

FRANKLIN H. MACKEY,

Attorney for Appellant.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1897.

RICHARD H. FLETCHER,
PLAINTIFF IN ERROR,

v.

THE BALTIMORE AND POTOMAC
RAILROAD COMPANY.

} No. 56.

*In Error to the Court of Appeals of the District of
Columbia.*

BRIEF FOR DEFENDANT IN ERROR.

This action was brought to recover damages for bodily injuries alleged to have been inflicted on the plaintiff by a piece of timber thrown from a moving train in the city of Washington. At the trial, after hearing the plaintiff's witnesses, the court directed a verdict and judgment for the defendant. On appeal to the Court of Appeals, this judgment was affirmed (6 App. D. C., 385). In the hope

of reversing the decisions of the two courts below, the plaintiff has brought this writ of error.

STATEMENT OF THE CASE.

The plaintiff on the trial in the circuit court of the Supreme Court of the District of Columbia testified in his own behalf, and his testimony tended to show that on the 16th day of May, 1890, he was employed by the defendant in its workshops, and had finished his day's work at about a quarter to six in the evening. He then started for home. When he came to South Capitol street and Virginia avenue he stopped to see if he could see any of the workmen coming, in order to have company on his way home. He was standing on the pavement, on the south side of the railroad track. The track ran down the middle of Virginia avenue. As he was standing there, *one of the defendant's work-trains passed by, going, as witness supposed, about 20 miles an hour.* These were open flat cars. There were a number of workmen on the cars returning from their day's work down the road and going home. *One of them threw from the car, just as it was passing plaintiff, a stick of bridge timber six inches square and about six feet long,* which struck and injured the plaintiff (4, 5).

Other testimony showed that the timber was thrown by a laborer named George Washington, who was riding on the train. There were a number of workmen on the train returning from their day's work down the road and going home, about six o'clock in the evening (6). The plaintiff did not produce Washington as a witness.

There was no attempt to prove that said George Washington had ever before thrown timber or anything else from this or any other train. No proof was offered to

show whether or not the piece of wood belonged to Washington, or to whom it belonged, nor to show for what purpose Washington threw it. For aught that appears, he may have thrown it at the plaintiff to gratify his own personal malice, or wantonly. The plaintiff confined his efforts to an attempt to prove that *other* laborers, at some other times and places during ten years before, had thrown wood from this train for use as fuel; but no single definite instance was proven. There was no evidence tending to show the purpose for which this stick of bridge timber was to be used—whether for fuel or for building or manufacturing purposes. The fair inference from the indefinite testimony is that it belonged to the defendant, and was intended by it for use in repairing or building a bridge.

The plaintiff sought to show that it had been the practice of laborers riding on this train to throw from it, while it was passing along the streets of Washington and Alexandria, pieces of wood, old rotten ties, &c., to be afterward carried to their homes by the men and to be used for fuel; and that no orders or regulations had been issued by the defendant's officers prohibiting such practice until after the injury to the plaintiff. For this purpose five laborers were called as witnesses, but their testimony was vague.

Cyrus Hall rode on this train at the date of the accident, but got off at Alexandria. He lived in Alexandria, and had been employed by the defendant and riding on repair trains about two-and-a-half years. During that time he had thrown off some timber and had seen others throw some off. He said he had thrown off wood in Washington for himself and others, four or five or maybe eight or ten times. He testified that they "had never been notified *thoroughly* by the railroad company not to

throw it off," and he also said that "we didn't have no *particular* order by the captain not to do it before the morning that the accident happened."

William Johnson had been employed by the defendant 8 or 9 years; at the time of the accident was a repair-man, and was on the car when the piece of wood was thrown off. He said he had seen pieces of timber thrown by the workmen from the work-train when in motion in this city; that he had seen this done quite often, *but how many times he was unable to tell*. This practice continued all the time he was on the road; that the "biggest portion" of the men employed on that train lived in Alexandria, and that the pieces of wood were generally thrown off in Alexandria; not much was thrown off in Washington, because the men who lived in Washington lived a "good ways" from the railroad, and they didn't often bring any wood "up here."

Thomas Coleman had been riding on work-trains nearly two years, and had seen pieces of timber thrown from the train "lots of times." He said about two-thirds of the workmen on this train lived in Alexandria, and that the men would throw off wood, sometimes three, four, and five times a week,—but whether in Alexandria or Washington he did not say.

Edward Noble had been employed with this train, and said he had seen pieces of timber frequently thrown from the train, and he had done it both in Alexandria and Washington; probably as often as *a dozen of times in ten years*. During this time the train came to Washington four or five times a week, and sometimes every day. Over two-thirds of the men employed on the train lived in Alexandria.

John Douglass was employed on the train only about six months, but saw wood, blocks, &c., pitched off the train, but did not remember how often; he had, himself, thrown

off wood in this city once or twice. Nearly all of the men lived in Alexandria.

This was the substance of all the evidence given on this point, and constituted the only claim of the plaintiff to recover against the railroad company for the act of Washington.

It appears, therefore, that these laborers, when they could get possession of a piece of wood, would take it on this train, and when near to their homes would drop it off. It was used for fuel. Most of the laborers lived in Alexandria, and, of course, those men did not carry any of such wood to this city. The proof seems to show quite conclusively that at least two-thirds of these laborers employed on this train lived in Alexandria.

POINTS AND AUTHORITIES.

In no possible view can the plaintiff have a right to recover on such testimony as in this case. To allow him to do so would be to sweep away all boundaries from the already sufficiently onerous doctrine that the employer is liable for the act of the employee, *within the scope of the employment*, and therefore would make the employer liable for *all* the acts of any person in his employ, no matter how disconnected from the employment,—in other words, an insurer of the public gratis against all accidents from such a source. The more closely the case is examined, the more clearly this will appear.

First. The act of Washington, the plaintiff's fellow-servant, complained of in this suit, was no part of his employment. His day's work had been done, and he was on his way home, as was the plaintiff. The throwing of this piece of timber was not connected, in the remotest degree, with the performance of any duty as a laborer or repairman

on the road. It was the independent act of the man who threw it off, for which he alone is liable, and the defendant cannot be held responsible for the consequence.

The courts have always maintained carefully the distinction between acts within and those outside of the scope of employment.

In *Howe v. Newmarch*, 12 Allen, 57 (1866), the rule is thus stated :

“If the servant, wholly for a purpose of his own, dis-regarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable.”

The subject is well discussed in Buswell on Personal Injuries, section 37, also at p. 47 ; also in 2 Wood on Railroads, p. 1391, which cites *M'Clenaghan v. Brock*, 5 Rich. Law (South Carolina), 17. In that case a slave was a passenger on a steamboat, and the engineer wounded him by negligently firing a gun. It was held that the captain was not liable, because the act was outside the scope of the engineer's duty.

In another case, the plaintiff's steamboat was moored to defendant's wharf and took fire in the night. Defendant's watchman on the wharf cut the cable, whereby the boat drifted away and was burned. Held, that defendant was not liable for the act of the watchman. (*Thames Steamboat Co. v. Housatonic R.R. Co.*, 24 Conn. 40.)

Where a boy six years old ran alongside a street car, and shook his hand playfully at the driver, and the driver struck him with the reins, causing him to fall under the car and become injured, the company is not liable, because a master is liable for the tort of his servant only when the act is committed by the servant *bona fide* as such, and in the line of

his employment. (Chicago City Ry. Co. v. Mogk, 44 Ill. App. 17.)

Misconduct of train hands, not in the discharge of their duties, in shouting so as to frighten a horse, will not render the railroad company liable for damages resulting therefrom. (Cobb v. Columbia and G. R. Co. (S. C.), 37 S. C. 194.)

Other cases are collected in 14 Am. and Eng. Cycl. Law, p. 809, title, "Master and Servant."

TWO MASSACHUSETTS CASES.

In the argument below and the opinion of the Court of Appeals (12), attention was devoted largely to the two cases in Massachusetts illustrating opposite phases of this question. Each was tried before a judge without a jury, but instructions were asked in the usual form.

The first in time is that relied upon by the plaintiff, *Snow v. Fitchburg R.R. Co.* (136 Mass., 552), but it will be found wholly different from the present case. Colburn, J., said in that case: "The plaintiff was a *passenger* on the railroad of the defendant, and properly *on the platform at the station*. * * * The plaintiff *sustaining this relation* to the defendant, and *being in this place*, the defendant was bound to exercise towards her such care and diligence as could reasonably be exercised to *protect* her from such injuries as human foresight could anticipate and prevent."

In the present case, Fletcher, so far from being a passenger, standing at a station, entitled to special protection, was either a fellow-servant or a casual passer-by.

Again, Colburn, J., said: "The defendant voluntarily furnished a car to run on its express train, from which it *knew* that mail bags *were to be* thrown at the station where

the plaintiff was, when the train was under full speed. Obviously * * * danger was likely to result to *passengers* on the platform of the station. * * * The case presented is unlike that of the act of a passenger, which the defendant had no reason to anticipate or power to prevent."

It is evident that in furnishing a mail car on this express train the Fitchburg Railroad must have known that it would be used for the very purpose of delivering mail bags, and from the statement of the case it seems that it had actual notice that mail bags would be delivered at this station; and as it knew in making its time tables that its own train did not stop there, it knew that the mail bag must be flung off at full speed. Carrying the mails was part of its business. The court adds that there was evidence tending to show that the mail bag had not unfrequently been so thrown as to strike *on this very platform*; and that the defendant had power to prevent this practice, if in no other way, by withholding the use of the car, or by stopping the train at the station.

That case was the same in law as if the mail bag had been flung into a passenger car and struck a passenger rightfully sitting there. To say, as in plaintiff's brief (p. 15), that it would have made no difference in the decision if the injured person had not been a passenger, is merely a bold assertion of counsel's opinion. The case itself is certainly no authority or precedent to that effect, for it is expressly founded on the doctrine of passenger and common carrier.

Over a year later, in 1885, with the foregoing case doubtless in mind, the same court decided *Walker v. N. Y. Central Sleeping Car Co.*, in which the facts were that one Maxwell, the porter on a sleeping car running between Albany and Boston, as his train was passing through

Newton, went out on the platform of his car and threw off a bundle containing soiled clothing and other articles belonging to himself. He had arranged, the day before, with a woman who lived near this point that he would throw the bundle off, and that she should get it and wash the linen. He had never thrown a bundle off before. This bundle struck and injured the plaintiff, Walton, and he brought suit against the sleeping car company. It was the duty of this porter to take care of the car, to keep it clean, and to wait upon the passengers, but he had nothing to do with washing the linen used in the car.

The trial judge ruled that upon all the evidence the plaintiff could not recover, and said :

"The defendant is not responsible if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant in the scope of his employment. If Maxwell was employed by the defendant as a porter upon its parlor car, and wholly for a purpose of his own, and disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw a bundle, his own property, from the platform of the parlor car, and thereby the plaintiff, *who was not a passenger*, was hit and injured while in the exercise of due care, and if this injury was done by Maxwell not within the scope of his employment, then the defendant is not liable. If, however, Maxwell negligently threw a bundle in the execution of the authority given him by the defendant, and for the purpose of performing what the defendant had directed, or if the injury to the plaintiff was done by Maxwell while acting within the scope of his employment, then the defendant would be liable."

In affirming this judgment the supreme court of Massachusetts used this language, to wit :

W. ALLEN, J. "The rulings and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was, at the moment, riding in a car of the defendant in which he was employed by it for other purposes."

The efforts of the plaintiff to distinguish between this case and the one at bar serve only to bring out the resemblance more clearly.

There is *no proof* that George Washington had ever thrown a stick of wood from the train before that time; and certainly the defendant is not bound to prove a negative in that respect. The plaintiff's case seems to be founded wholly on assumptions instead of facts. The plaintiff expects the court to assume that this "stick of bridge timber" (plaintiff's brief, p. 2) was intended by somebody for firewood; but there is no proof that George Washington desired or needed firewood. Why should we not assume that the piece of bridge timber was properly and lawfully on the car, and that George Washington threw it at the plaintiff wantonly or for the purpose of injuring or scaring him? This supposition is just as fair and reasonable as the other, in the absence of proof; and if Washington threw the bridge timber for any purpose of his own, to gratify his private hate, or any other wanton or mischievous purpose, the defendant cannot be held responsible. Here there was no possible color of discharging his duty on the part of the man who threw off the bridge timber. His day's work was over, and the timber was no part of the load which had been on the train.

The master is not liable for the independent wrong act

of the servant not commanded by the master or ratified by him, but perpetrated to gratify the private hate of the servant, although done under color of discharging his duty to his employer.

Baum v. R.R Co., 26 Ind. 70.

Isaacs v. 3d Ave. R.R., 47 N. Y. 122.

McMannus v. Crickett, 1 East. 106.

Gregory v. Piper, 9 B. & C. 591.

Croft v. Alison, 4 B. & Ald. 590.

Mali v. Lord, 39 N. Y. 381.

Second. Foreseeing the obstacle of the doctrine concerning scope of employment, the plaintiff seems to have thought to overcome it by proving some sort of usage or habitual practice, on the part of the men carried on this train, of throwing off pieces of wood, and therefore he undertook to prove that they did habitually bring into this city wood of various kinds for their own use *as fuel*, and that they threw it off this train habitually, and that the defendant should have known of the existence of this practice, and was therefore chargeable with full knowledge of it. Now, it will not be overlooked that the plaintiff made no effort to show that this particular piece of bridge timber was intended to be used as fuel; if the proof had successfully shown that the practice of throwing off wood did actually prevail, as was claimed, still the plaintiff could not claim the benefit of this usage without first showing that this stick of bridge timber was intended for use as firewood or fuel, and that it was thrown off for that purpose; but there is nothing in the evidence to show that it was not the property of the company and was not properly on the train. There being no such proof offered, the plaintiff failed to bring his case within the alleged usage.

It will hardly be insisted, if this stick of bridge timber

was the property of the defendant, and belonged on the train, and under those circumstances was, without any authority, pitched off by an employee whose employment had ceased for that day, and without any reason for the act being shown, that the defendant would be liable. Suppose a laborer riding home on a train of cars loaded with coal, passing through the city, should, mischievously or otherwise, throw a chunk of coal at a person on the street and injure him, would the railroad company be liable for the injury? According to the above-cited authorities, it would not be.

In *O'Neill v. Keokuk, etc., R.R. Co.* (45 Iowa, 546) it was held that evidence showing that the employees of a railroad company were accustomed to act in violation of a rule of the company is not admissible to establish a waiver of the rule, unless it be shown that the custom was known to the officer charged with the enforcement of the rule. It could not be so regarded by reason simply of a custom on the part of those for whom it was made to violate it. (27 Am. and Eng. Cycl. Law, 900, 901.)

The objection to the novel and unsupported doctrine put forward by plaintiff is that, once admitted, there are no possible limits to its application. Suppose that a laborer riding home on a flat car lighted his pipe and threw the burning match in the eye of some person standing near the track. It would be easy to prove a "custom" on the part of workmen to smoke pipes on their way home. Could it be argued that the railroad company was liable because it did not make an order forbidding its laborers to smoke, or directing the careful extinguishment of matches?

Moreover, if the practice of throwing wood from this train was so incessant and notorious as the plaintiff argues in his brief, it seems that the plaintiff, an employee of the

same road and going home at the same hour, must have been aware of it, and was guilty of contributory negligence in standing so close to the train as it passed.

There is an inevitable gap in all the arguments for plaintiff which no ingenuity or ability of counsel can close. Thus, it is said that a moving train is "an instrument of danger" (p. 4.), which is true; but then the plaintiff was not hurt by the train, but only by the interposed free-will act of Washington, in throwing the timber. If Washington had not been on the train when he threw this timber, the plaintiff might have been just as much hurt. A case is cited in regard to a torpedo (*Walker v. Hannibal, &c., R.R. Co.*, 26 S. W. Rep. 363); but a bridge timber is an inert mass, not an explosive. The defendant here was not bound to chain or nail down every piece of wood on its trains, because somebody might use it as a missile.

The torpedo case just mentioned is not applicable here. The injury was to a boy, and the negligence of the railroad company, as in the "turn-table case" (17 Wall. 657), was in leaving dangerous apparatus within reach of children. The distinction is well shown by another torpedo case, *C. B. & Q. R.R. v. Epperson* (26 Ill. App. 72), where a fireman took torpedoes from the caboose and put them on the track to assist in a Fourth of July celebration, and it was held that the railroad company was not liable for the consequences of their explosion in that way.

In *Railroad v. Derby* (14 How. 468), cited by plaintiff, the conductor was acting clearly within the scope of his employment in directing the movement of the train; and in *Railway v. Hinds* (53 Penn. St. 512) the person injured was a passenger. No case is cited which sustains the novel doctrine that the alleged throwing of timber by other persons would make the railroad liable for the

piece thrown by Washington. To make any argument for it, the appellant has to confuse two different things, viz., the running of the work-train, which was the defendant's business, with the throwing of the timber by Washington, which was not its business.

The doctrine "res ipsa loquitur" might apply in a suit against Washington, but it does not go to prove any liability of the railroad company.

Third. The testimony of the plaintiff, given to show the practice of the laborers, was not admissible under the declaration, and could not properly be submitted to the jury.

The declaration charges that the defendant was guilty of negligence, inasmuch as one of its servants at a certain time specified negligently threw a piece of timber from a passing train, and that it struck and injured the plaintiff. This is the only charge of negligence, and it is in the following words and figures :

"That heretofore, to wit, on the 16th day of May, A. D. 1890, at the city of Washington, in the District of Columbia, the plaintiff, while peaceably and lawfully on the public streets, to wit, on South Capitol street, near the corner of Virginia avenue, in said city and District, was, by and through the carelessness and negligence of the defendant, its servants and agents, violently struck in the left inguinal region of the body with a large and heavy piece of timber carelessly and negligently thrown by one of the defendant's servants from one of the cars of the defendant, whereby the plaintiff was greatly bruised and seriously and permanently injured."

On the trial of this cause, the plaintiff's counsel, appreciating the insufficiency of this statement of his case, sought to enlarge it by producing testimony tending to show that for a long time there had prevailed with the laborers riding on this train a practice of throwing from the train

pieces of wood, timber, &c., to be used by them for fuel. Such testimony was not admissible. The defendant had the right to fair notice of the negligence with which its officers and agents were to be charged. The only charge of negligence was to the effect that the plaintiff was violently struck with a heavy piece of timber negligently thrown, by one of the defendant's servants, from one of the cars of the defendant. There is no allegation here that the defendant had any knowledge of this act, or that it either directed it beforehand, or confirmed and adopted it afterward, nor is there anything in the declaration alleging that the plaintiff knew of this alleged practice or that it ought to have known it. The fundamental rules of pleading require that such charges to be proven must be alleged. The allegation and the proofs must agree. The defendant came into court to defend itself from the charge of misbehavior, based upon a single act which was alleged to have occurred on the 16th of May, 1890, in Washington, and not against a charge of many acts supposed to have been committed at many different and unspecified times, and in and about Alexandria, as well as in Washington.

In 1 Chitty on Pleading (p. 392) it is said: "In an action on the case against a master for the negligence of his servant, it has been decided that the negligence may be stated according to its legal effect, namely, as that of the master, without noticing the servant; but as the object of pleading is to apprise the opposite party of the facts, it is more correct to state them truly." Citing *M'Manus v. Crickett*, 1 East. 106, 110; *Brucker v. Froment*, 6 Term Rep. 659.

In the present case the proof showed that the alleged servant of the defendant was not acting as its servant at the time of the injury, and it is sought to maintain the ac-

tion on a wholly different ground, namely, a usage by which the defendant habitually allowed wood to be thrown from this train by other persons. There is no allegation under which such proof is admissible; in fact, it is legally a variance from the statement in the declaration, that plaintiff was struck with a piece of timber "negligently thrown by *one of the defendant's servants*," which necessarily implies that the servant was acting as a servant, and is not a statement that the defendant negligently permitted the timber to be thrown by a person merely taking a ride on the train.

Fourth. Even if evidence of common practice might have been submitted and considered, it wholly failed to establish any such habitual practice. It is plain from the evidence that the scattered acts mentioned in the very indefinite testimony took place only occasionally, and in both Alexandria and Washington; but most of them took place in Alexandria, where two-thirds of the workmen resided. No one of the witnesses pretends to give an estimate of the number of times this sort of an act was done. The weight of evidence shows that such occurrences were very rare in Washington, and not another instance of the throwing of wood from this train is specified by any witness. No place is specified, no time is given, and the witnesses were speaking of indefinite instances extending over periods of time from six months to ten years.

Plaintiff is certainly not justified in arguing in his brief (p. 3) that it "was the constant and daily habit of the men during all these years" to throw off firewood. It might very well be asked where such an amount of wood could come from along one short section of the line of a railroad company.

Fifth. Both of these men had finished their day's work. The plaintiff had left the defendant's shop where he was employed, and was on his way home; the other, the man

who threw off the piece of timber, was going home on the train. So far as the defendant was concerned, it had nothing to do with either of them. But if it did, then they were fellow-servants, and the defendant is not liable.

If these two men still sustained the relation of servant in the employment of the master, then the defendant is not liable. A man employed about a repair shop is a fellow-servant of one employed on a train. They are engaged in the common employment of the master. A brakeman on a train of cars is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, with the inspector of the machinery and rolling stock of the road, and with the superintendent of the movement of trains. (*Wonder v. B. & O. R.R.*, 32 Md. 411, 418.)

This has been settled recently by the Supreme Court of the United States in the case of *R.R. Co. v. Hamby*, 154 U. S. 349. See also—

Randall v. B. & O. R.R., 109 U. S. 478.

B. & O. R.R. v. Baugh, 149 U. S. 368.

Tuttle v. R.R. Co., 122 U. S. 189.

O'Rorke v. R.R. Co., 22 Fed. Rep. 189.

Quebec S.S. Co. v. Merchant, 133 U. S. 375.

Rohback v. R.R. Co., 43 Mo. 187.

Wood on M. & S., p. 844 *et seq.*, and notes.

Bunt v. Sierra Co., 138 U. S. 483.

D. C. v. McElligott, 117 U. S. 621.

Murphy v. N. Y. Cent. R.R. Co., 11 Daly, 122.

1 S. & R. on Neg., sec. 184 *et seq.*, and note.

Baltimore Elevator Co. v. Neil, 65 Md. 438.

Besel v. N. Y. C. & H. R. R.R. Co., 70 N. Y. 171.

Smith & Potter, 46 Mich. 258.

C. & X. R.R. v. Webb, 12 Ohio St. 475.

Mackin v. R.R. Co., 135 Mass. 201.

B. & P. Co. v. Jones, 95 U. S. 439.

CONCLUSION.

We submit that to decide for the plaintiff in this case would establish a novel doctrine, unsupported by precedent or by sound public policy, and dangerous in enlarging to an incalculable degree the liability of employers. The judgment of the court below should be affirmed.

ENOCH TOTTEN,
WM. HENRY DENNIS,
Attorneys for Defendant in Error.

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If known it was acquiesced in, whether it was a dangerous custom from which injury should have been apprehended, and whether there was a failure, on the part of the defendant, to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act.

The duty to use ordinary care and caution is imposed upon a railroad company to the extent of requiring from it the use of reasonable diligence in the conduct and management of its trains, so that persons or property on the public highway shall not be injured by a negligent or dangerous act performed by any one on the train, either a passenger, or an employé, acting outside of and beyond the scope of his employment.

A railroad company owes a duty to the general public, and to individuals who may be in the streets of a town through which its tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could have been prevented by the exercise of reasonable diligence on the part of the company.

If, through and in consequence of its neglect of such duty, an act is performed by a passenger or employé, which is one of a series of the same kind of acts, and of which the company had knowledge and in which it acquiesced, and the act is in its nature dangerous, and a person lawfully on the street is injured as a result of it, the railroad company is liable. The fact that the custom had existed for some time without any injuries having been received by any one is not a legal bar to the liability of the company.

THE case is stated in the opinion.

Mr. Franklin H. Mackey for plaintiff in error.

Mr. William Henry Dennis for defendant in error. *Mr. Enoch Totten* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was brought by the plaintiff in error to recover damages from the defendant corporation, for personal injuries which he alleged he received by reason of the negligence of its agents and servants.

The evidence given upon the trial upon the part of the plaintiff tended to show that on or about the 16th day of May, 1890, the defendant was a railroad corporation doing

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business in the District of Columbia, and that on the day above mentioned, at the city of Washington in that District, the plaintiff was in the employment of the defendant and had been working at its workshop; that he had finished his work for the day at about a quarter of six in the evening, and leaving the shop had started for his home. When he reached the intersection of South Capitol Street and Virginia Avenue he stopped for a moment, and while standing on the pavement on the south side of the railway track, which was in the middle of Virginia Avenue, a repair train of the defendant corporation passed by him on its return from work for the day. Some of the testimony showed that the train was passing at the rate of twenty miles an hour, while other testimony showed a much less rate of speed. As the train passed the plaintiff one of the workmen on board threw from the car on which he was standing a stick of bridge timber about six inches square and about six feet long. It struck the ground and rebounded, striking the plaintiff and seriously and permanently injuring him. The defendant had been in the daily habit for several years of running out of Washington and Alexandria a repair train of open flat cars loaded with its employés, and the train returned every evening about six o'clock and brought the workmen back to their homes. These men were allowed the privilege of bringing back with them, for their own individual use for firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, cross-ties, etc. It was the constant habit of the men during all these years to throw off these pieces of firewood while the train was in motion at such points on the road as were nearest their homes, where the wood was picked up and carried off by some of the members of their families or other person waiting there for it. The only caution given the men on the part of the servants or agents of the company was that they should be careful not to hurt any one in throwing the wood off. The foreman of the gang was the man who usually gave such instruction.

This evidence having been given, the plaintiff rested, and the defendant then moved for the direction of a verdict in its

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favor, which motion was granted, and the judgment entered on the verdict having been affirmed by the Court of Appeals, 6 App. D. C. 385, is now before us for review.

In this ruling of the courts below we think there was error.

We are not called upon to say that the defendant was in fact guilty of negligence. The courts below have held as matter of law that the company was not liable, and hence a verdict in its favor was directed. On the contrary, we think the question whether the defendant was negligent was one which should have been submitted to the jury.

The plaintiff at the time of the accident had finished his employment for the day, and had left the workshop and grounds of the defendant, and was moving along a public highway in the city with the same rights as any other citizen would have. The liability of the defendant to the plaintiff for the act in question is not to be gauged by the law applicable to fellow-servants, where the negligence of one fellow-servant by which another is injured imposes no liability upon the common employer. The facts existing at the time of the happening of this accident do not bring it within this rule. A railroad company is bound to use ordinary care and caution to avoid injuring persons or property which may be near its track. This is elementary. *Shearman & Redfield on Negligence*, (3d ed.) § 477 and cases cited in notes. The duty to use ordinary care and caution is imposed, as we think, upon the company to the extent of requiring from it the use of reasonable diligence in the conduct and management of its trains, so that persons or property on the public highway shall not be injured by a negligent or dangerous act performed by any one on the train, either a passenger or an employé acting outside and beyond the scope of his employment. The company does not insure against the performance of such an act, but it rests under an obligation to use reasonable diligence to prevent its occurrence. An act of such a nature, either by a passenger or by an employé outside the scope of his duties and employment, is not to be presumed, and therefore negligence on the part of the company in failing to prevent the act could not probably be shown by proof

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of a single act of that kind, even though damage resulted, where there was nothing to show the company had any reason to suppose the act would be committed. Negligence on the part of the company is the basis of its liability, and the mere failure to prevent a single and dangerous act, as above stated, would not prove its existence. The persons on this train were employés, in fact, and were being transported to their homes by the company, which had, during the time of such transportation, full control over their actions. Whether or not they were through with their work is not material.

If the act on the car were such as to permit the jury to find that it was one from which, as a result, injury to a person on the street might reasonably be feared, and if acts of a like nature had been and were habitually performed by those upon the car to the knowledge of the agents or servants of the defendant, who with such knowledge permitted their continuance, then in such case the jury might find the defendant guilty of negligence in having permitted the act and liable for the injury resulting therefrom, notwithstanding the act was that of an employé and beyond the scope of his employment and totally disconnected therewith. Knowledge on the part of the defendant, through its agents or servants, that passengers or employés upon its trains were in the habit of throwing out of the windows newspapers, or other light articles, not in their nature dangerous, would not render the company liable on the ground of negligence, although on some one occasion an individual might be injured by such act. The result in that case would be so unexpected, so extraordinary and so unnatural that a failure to prevent the custom could not be said to be negligence. But if a passenger upon a train or an employé of the company upon one of its cars should supply himself with a quantity of stones for the purpose of throwing them off the train as it passed through a city, can it be possible that under such circumstances, if this intended use of the stones came to the knowledge of those who had the conduct of the train, it would not be their duty to prevent the act? And would it be any answer for the company, when charged with negligence in knowingly or negligently permit-

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ting such passenger or employé to throw the stones, to say that the person throwing them was a passenger, or, if an employé, that he had completed his work for the day and was being transported to his home on the car of the company, and that the act was without the scope of his employment? Surely not. It is not a question of scope of employment or that the act of the individual is performed by one who has ceased for the time being to be in the employment of the company. The question is, does the company owe any duty whatever to the general public, or, in other words, to individuals who may be in the streets through which its railroad tracks are laid, to use reasonable diligence to see to it that those who are on its trains shall not be guilty of any act which might reasonably be called dangerous and liable to result in injuries to persons on the street, where such act could by the exercise of reasonable diligence on the part of the company have been prevented? We think the company does owe such a duty, and if through and in consequence of its neglect of that duty an act is performed by a passenger or employé which is one of a series of the same kind of act and which the company had knowledge of and had acquiesced in, and if the act be in its nature a dangerous one, and a person lawfully on the street is injured as a result of such an act, the company is liable. Any other rule would in our opinion be most disastrous, and would be founded upon no sound principle.

We feel quite clear that, from the evidence in this case, it was for the jury to say whether the custom was sufficiently proved, and whether the act was of a nature from which injury to a person on the street might reasonably be expected, and also whether such acts had theretofore been performed with the knowledge and consent of the agents and servants of the defendant, and whether the company was guilty of an omission of the duty which it owed to the plaintiff as one of the public, lawfully using the street where the track was. We do not say that the jury should be instructed to find that the defendant was guilty of negligence in case they found from the evidence that this custom was known to its officers or agents, but we do say that the custom being known,

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whether it was negligence or not for the company to permit it under all the circumstances, was a question to be decided by the jury and not by the court. The company of course is not an insurer of the safety of the public in the highway along or near which its road may run, but it is bound, as we have stated, to use reasonable diligence to see to it that no dangerous acts which may result in injury to persons lawfully on the highway shall be committed by persons who are on its trains, whether as passengers or employ  s. If it neglect that duty, then there is a liability on its part to respond in damages for the injury resulting from that neglect.

The fact that this custom had existed for some time without any injuries having been received by any one is not a legal bar to the liability. It may be addressed to the jury as an argument upon the question whether the act was in its nature dangerous, and whether under all the circumstances the company was guilty of any negligence in permitting its continuance; but if the character of the act complained of is such that a jury might upon the evidence fairly say that injury to others might reasonably be apprehended, the fact that none such had theretofore occurred is not an answer as matter of law to the charge of negligence in continuously permitting acts of that nature. As against the contention that this act was not in its nature dangerous it might be urged to the jury that the caution given to be careful showed that there might be danger in the performance of the act itself. It would be for the jury to answer the question.

We are not able to see the bearing upon this case of the case of *Walton v. New York Central Sleeping Car Co.*, 139 Mass. 556. In that case there was but a single act, that of throwing the bundle from the train by the porter of the parlor car; there was no evidence that any officer of the company on the train had the least reason to suppose the porter intended to do the act or that it had been habitually done before; no evidence of any custom known to the defendant by which at that or any other particular point the porter of the car habitually and frequently threw bundles from the moving train. Acquiescence on the part of the defendant

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after knowledge of the custom could not from the one act be imputed to it. Very probably, a single act so performed by the porter without the knowledge or assent of the defendant — performed for his own purposes and not in the scope of his employment, unexpected and wholly disconnected from his duties — would not render the defendant liable for the injuries resulting to a third person from such act. If, however, it had been proven in that case that it was the custom on the part of the porters on that car to throw these bundles off while the train was in motion, and that this custom was known to the officers of the company, and was permitted by them, with the simple injunction that the porters should take care and not hurt anybody, and if the jury found that the act was one dangerous in its nature, we think there is no doubt that the defendant would be liable for the injuries resulting from any one of such acts.

The trial court in the case cited, while holding the defendant not responsible, said: "The defendant is not responsible if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders or doing the defendant's work, and not while acting as such servant in the scope of his employment." The important point was, it is to be observed, that the act of Maxwell, although the servant of the defendant, was without its authority, knowledge or acquiescence. In this case, upon the evidence submitted, the jury might be asked to infer knowledge on the part of the defendant of the existence of the custom and acquiescence on its part in such custom, and that therefore the acts of the individuals in throwing the timber were acts which were performed with the authority of the defendant. The act would be performed with the authority of the defendant, if, being aware of the custom, the defendant or its agents permitted such acts and made no effort to prevent their performance and issued no orders forbidding them. If the jury should also find that the act was one of a dangerous nature, from which injury to an individual on the roadside might reasonably be expected, then the jury

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might find the defendant guilty of a neglect of duty in permitting its performance.

We do not think the case of *Snow v. Fitchburg Railroad*, 136 Mass. 552, can be distinguished from this case by reason of the simple fact that the person injured was a passenger who was at the station and upon the platform where the mail bag was thrown. It may be true the defendant owes a higher duty to its passengers, in the shape of a greater degree of care, than it does to the public generally, but it is a question only of degree. It owes a duty to the public not to injure any one negligently, and the facts in this case make it a question for the jury to say whether it has not been guilty of negligence resulting in plaintiff's injury.

Considerable stress was laid upon the case of *Walker v. Hannibal & St. Joseph Railroad*, 121 Missouri, 575, as an authority against the principle which we have above referred to. We have examined that case and regard the facts therein set forth as so materially different that the case cannot be regarded as opposed to the views we have stated. The baggagemaster in gratuitously taking in his car the drills (not properly baggage) which he threw out at the station as he passed through, was held not to have been acting within the scope of his employment, and as there was no proof of knowledge on the part of the railroad authorities, it was held that the railroad company was not responsible for this act of the baggagemaster not done in the scope of his employment and of which they had no notice. It is stated in the opinion that the trainmaster, the superintendent of the defendant and also the general agent were all ignorant that the drills were being carried by the baggageman on the passenger train, and, in speaking of the act and the arrangement under which it was performed, the court said: "The arrangement seems to have been one between plaintiff for the lime company and James, the train baggageman, with reference to something not in the line of his employment, and of which his employer had no knowledge and gave no consent."

Upon the whole, we think it was a question for the jury to say whether the custom was proved; whether, if proved, it

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was known to and acquiesced in by those in charge of the train as servants of the company; whether it was a dangerous act, from which injury to a person on the street might reasonably be apprehended, and if so, whether there was a failure on the part of the defendant to exercise reasonable care, in view of all the circumstances, to prohibit the custom and prevent the performance of the act.

For these reasons we are of the opinion that the judgment should be

Reversed, and the cause remanded to the Court of Appeals of the District of Columbia, with directions to reverse the judgment of the Supreme Court of the District of Columbia and to remand the case to that court with directions to grant a new trial.

FLETCHER v. BALTIMORE AND POTOMAC RAILROAD COMPANY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 56. Argued October 20, 21, 1897. — Decided November 1, 1897.

The plaintiff in error was a workman employed by the defendant in error at its workshop in Washington. Returning from his day's labor, he stopped at the intersection of South Capitol Street and Virginia Avenue, to enable a repair train to pass him. It was and for a long time had been the custom of the railroad company to allow its workmen, who went out on the repair train in the morning, to bring back with them on their return in the evening sticks of refuse timber for their individual use as firewood, and these men were in the habit of throwing their pieces off the train while in motion, at the points nearest their own homes, being cautioned on the part of the company not to injure any one in doing it. As the train passed the plaintiff in error, such a piece of refuse wood was thrown from it by one of the men. It struck the ground, rebounded, struck the plaintiff in error, and injured him seriously and permanently. He sued the company to recover damages. After the plaintiff's evidence was in and he rested, the defendant moved for a verdict in its favor, which motion was granted. *Held*, that this was error; that the question whether the defendant was negligent should have been submitted to the jury; and that it was for the jury to say whether the custom on the part of the workmen was known to the company, whether